No. 04-115

Supreme Court, U.S.
FILED
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In the

Supreme Court of the United States

CARSON HARBOR VILLAGE, LTD.,
a Limited Partnership, dba Carson Harbor
Village Mobile Home Park

Petitioner,

v.

CITY OF CARSON, a Municipal Corporation;
CARSON CITY MOBILEHOME PARK
RENTAL REVIEW BOARD; and CARSON HARBOR
VILLAGE MOBILEHOME PARK HOMEOWNERS
ASSOCIATION, Real Party in Interest, .

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Petitioner Carson Harbor Village, Ltd., (CHV) hereby replies to the Respondents' Brief in Opposition (Opp.) served by Respondents City of Carson, et al. (City) on August 18, 2004. The Petition for Writ of Certiorari (Pet.) in this case asks this Court to resolve a conflict among the Circuits by determining whether a federal takings claim is ripe for federal adjudication when a state supreme court has expressly foreclosed inverse condemnation as a remedy for this class of takings, Pet. at 4-11, and the courts of the state have uniformly found no takings liability in cases raising the identical type of claim. Pet at 12-15. CHV also asks this Court to revisit an important question of federal law raised but left open in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997): whether the Fifth Amendment's requirement of just compensation for a taking can be satisfied by a remedial scheme that requires the injured property owner to attempt to raise revenues from private third parties to offset the government's liability for the taking. Pet. at 15-18.

The City's Opposition highlights the urgency of these issues, and provides additional insight into why it is imperative for this Court to grant the Petition.

I

THE CITY IDENTIFIES NO PROCEDURAL OR FACTUAL ISSUES THAT DETRACT FROM THIS CASE'S FITNESS FOR REVIEW

The City's Opposition asserts "unique factual and procedural issues" that supposedly detract from the fitness of this case for immediate review. Opp. at 14-16. None of these supposed issues are in fact before this Court, and they would have no impact whatsoever on the precedential value of this case as a vehicle to resolve the important conflicts identified in the Petition.

A. Williamson County's First Prong Was Found to Be Satisfied by the Court Below, and the City Did Not Seek Review of That Ruling

According to the Ninth Circuit in the decision below, "We think it beyond question—and the City does not dispute—that Carson Harbor's regulatory takings claim satisfies the first (finality) prong of the *Williamson* ripeness test." Pet. App. A-7. The City now seeks to put this issue in dispute, claiming that "CHV failed to obtain a final decision concerning the application of the Ordinance to its property and its takings claim is unripe for that reason as well." Opp. at 16. If the City believed the above holding of the Ninth Circuit was in error, it should have filed a cross-petition for certiorari seeking review of that question in this Court. Sup. Ct. R. 12.5. Since it did not do so, the ripeness of CHV's claim under *Williamson's* first prong is established as law of the case.

B. Preclusion Issues That Were Not Considered Below Have No Relevance to the Fitness for Review of the Questions Presented in the Petition

In addition to its belated invocation of *Williamson's* first prong, the City seeks to inject arguments concerning claim and issue preclusion that were addressed by neither the District Court nor the Ninth Circuit, and are therefore not before this Court. Opp. at 16. The City implies that the pendency of these issues to be addressed on remand makes it "inappropriate" for this Court to resolve the ripeness question that is squarely presented for review. *Id.* at 14. This is an obvious non sequitur. This Court granted certiorari in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, and resolved an important federal ripeness issue notwithstanding the fact that the lower courts had yet to address "the relevance of the TDR's to the issue of whether a taking has occurred," *id.* at 739, as well as a disputed issue of valuation. *Id.* at 742. Similarly, the

Court should take up the present case to resolve an important question left unanswered in *Suitum* regarding the adequacy of California's substitute for just compensation (*see* Pet. at 15-18), regardless of how the case may ultimately fare on the merits upon remand.

C. CHV's Present Litigation of Its State Claims in State Court Has No Bearing on the Fitness for Review of the Questions Presented in the Petition

The gravamen of CHV's Petition for Certiorari is that CHV was wrongfully required, by the decision below, to pursue a due process remedy via state court mandamus proceedings as the first step in "ripening" its Fifth Amendment takings claim for litigation in federal court. *See* Petition at 1-11. With remarkable irony, the City now complains that the case is not fit for review by this Court *because* CHV has done what it was improperly forced to do by the Ninth Circuit—that is, to begin litigating an administrative mandamus claim in state court! Opp. at 14-15. Contrary to the City's implication, the important federal questions presented by the Petition are not at issue in the state mandamus action. In fact, *no* federal issue of any sort is before the state court, because CHV has expressly reserved *all* its federal claims, pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964).[1]

As was fully set out in the Petition, there is no possibility that the state mandamus action could result in an award of just compensation to CHV, under either the state or federal

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[1] *See Carson Harbor Village, Ltd., v. City of Carson Mobilehome Park Rental Review Board*, Los Angeles County Superior Court Case No. BS077148, Verified Petition for Writ of Administrative Mandate, filed July 11, 2002, at 2:25-27 ("Claims under federal law that also arise as a result of the Board's actions are being pursued in federal court, and Petitioner specifically reserves all of its federal claim[s] for hearing in federal jurisdiction.")

constitutions. *See* Pet. at 4-11. Sadly, however, there is some truth to the assertion that the state proceedings might "eliminate" any opportunity for federal review of CHV's federal takings claim. Opp. at 15. The reason is well known in the literature as "the *Williamson* trap": after takings plaintiffs have been forced to divert their time and resources to the futile pursuit of a chimerical state remedy, they may be told that their Fifth Amendment claim is barred from federal adjudication under the doctrines of res judicata or collateral estoppel. *See, e.g.*, J. David Breemer, *Overcoming* Williamson County's *Troubling State Procedures Rule: How the* England *Reservation, Issue Preclusion Exceptions, and the Inadequacy Exception Open the Federal Courthouse Door to Ripe Takings Claims*, 18 J. Land Use & Envtl. L. 209, 240 (2003) ("Unfortunately, following *Williamson County*, many federal courts have converted the state procedures rule into a permanent jurisdictional bar by applying state rules of claim and issue preclusion."); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory Takings*, 3 Wash. U. J. L. & Pol'y 99, 105-06 (2000) ("some courts have concluded that once state court litigation has taken place, standard doctrines of claim and issue preclusion bar any later litigation, regardless of what *Williamson County* may have said."); Madeline J. Meacham, *The Williamson Trap*, 32 Urb. Law. 239, 239 (2000) ("If [litigants] bring their federal claims in federal court without having first brought their inverse condemnation claims in state court, their claims will be dismissed on ripeness grounds . . . . However, if they bring their federal claims in federal court after having unsuccessfully litigated their takings claims in state court, they typically find that their claims are barred on res judicata or collateral estoppel grounds.").

Even though CHV has carefully reserved its federal claims, the decision below has not only forced it into litigation before a state judiciary that has already ruled that just compensation is not available, but now exposes CHV to the risk that its federal

constitutional claim will never be heard in federal court. The greatest injustice of this "trap" is that, if CHV's federal takings claim is ultimately barred by preclusion, CHV will not be able to secure review on the merits even by a grant of certiorari from this Court. Instead, like the property owners in *San Remo Hotel L.P. v. City and County of San Francisco*, 364 F.3d 1088 (9th Cir. 2004), CHV will be limited to seeking review of the adverse procedural holding.

This absurd state of affairs cannot be justified by any sensible conception of "ripeness," and cannot be what this Court intended in *Williamson County*.

II

THE OPPOSITION BRIEF HIGHLIGHTS THE NEED FOR FEDERAL COURTS TO CLOSELY SCRUTINIZE THE *ACTUAL* AVAILABILITY AND ADEQUACY OF STATE COURT REMEDIES UNDER *WILLIAMSON COUNTY*

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), this Court required a heightened level of scrutiny to examine the actions of governmental entities, to determine whether there has been a violation of individual rights guaranteed by the Fifth Amendment. The Court recognized that complying with the requirements of the Takings Clause was more than a mere pleading requirement; deferential review is inappropriate when constitutional rights are at risk. *Id.* at 841.

The requirement of heightened scrutiny is no less compelling in examining the question of whether a state's judiciary *in fact* makes a meaningful compensation remedy available to victims of that state's public instrumentalities. In the case at bar, the Ninth Circuit applied the greatest possible deference to the California courts' vague representations that somehow, some day, some takings plaintiff may be awarded just compensation, through mechanisms that have yet to be

determined.[2] Although state courts must be the final arbiters of state law, it is the federal judiciary's responsibility to uphold individual rights guaranteed by the United States Constitution. When the issue is whether state courts *in fact* provide the safeguards and protections constitutionally mandated for all Americans, the absolute deference employed by the Ninth Circuit in the decision below is misplaced.

The need for meaningful review of the pronouncements of state courts concerning the remedies they *actually* make available to federal takings plaintiffs is highlighted by the sources cited in the City's Opposition Brief. As a careful review of state decisions will attest, the compensation requirement mandated by *Williamson County* for federal takings claimants in CHV's position has been absolutely foreclosed by the California Supreme Court, notwithstanding the existence of comforting dicta serving to obscure that fact.

A. For This Class of Takings Claims, California's Compensation Remedy Is Not "Uncertain;" It Has Been Expressly Foreclosed

The Opposition Brief attempts to characterize California law as merely "uncertain" on the question of whether an inverse condemnation remedy is available to CHV. Opp. at 13. But in fact, the California Supreme Court, ruling on a claim identical to CHV's, has expressly proclaimed that a rental property owner who alleges a regulatory taking based on the deprivation of a fair return by a local rent board ***"is not entitled to maintain***

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[2] A review of the Westlaw or Lexis databases will confirm that in the entire 154-year history of the State of California, no decision of that state's supreme court has *ever* awarded or sustained an award of just compensation for a regulatory taking. Indeed, the state's high court has failed to reverse or depublish only one such award—and that case included elements of a *physical*, not just a regulatory, taking. *See Ali v. City of Los Angeles*, 91 Cal. Rptr. 2d 458 (Ct. App. 1999).

an inverse condemnation action." *Kavanau v. Santa Monica Rent Control Board,* 941 P.2d 851, 854 (Cal. 1997).

In an exercise in semantic playfulness, the City asserts that *Kavanau* was not a takings case at all, but rather a substantive due process case. Opp. at 3, 6-7. But this was the essence of the California Supreme Court's ruling in *Kavanau*—converting a takings claim into a due process claim, by holding that no just compensation remedy is available. Until this ruling, there was no doubt that Kavanau had successfully established liability against the City of Santa Monica for a regulatory taking, and the sole remaining question was the amount of just compensation due. *See, e.g., Santa Monica Beach, Ltd. v. Superior Court*, 50 Cal. Rptr. 2d 726, 732 n.3 (Cal. App. 1996) (the appellate panel that ruled on Kavanau's initial claim characterizes his case as one in which "a taking was already determined in a judicial proceeding and the only remaining issues would be whether that taking was the result of a regulation which did not meet the standards articulated in this opinion and, if it did not, the amount of damages to which Mr. Kavanau is entitled.").

The City further seeks to avoid the impact of *Kavanau* by characterizing that decision as holding merely that "no taking" could occur on the facts of that case (or in the case at bar), rather than its straightforward statement that inverse condemnation is not available as a remedy in such cases. Opp. at 8. But regardless of whether *Kavanau* is interpreted as foreclosing inverse condemnation or ruling that no taking will be found on these facts as a matter of law, *Williamson County's* second prong would be deemed waived for futility everywhere but in the Ninth Circuit.

B. Even the Speculative Availability of Damages under 42 U.S.C. § 1983 Would Apply (If at All) Only to a *Second* Violation of CHV's Rights

The City asserts, without supporting quotation, that *Galland v. City of Clovis*, 16 P.3d 130 (Cal. 2001) provides "that a landlord can state an inverse condemnation claim against the government under state law," Opp. at 8, and again, "*Galland* provides . . . [that] an inverse condemnation or a takings claim can be brought against the governmental agency." Opp. at 13. With all respect, the City is apparently referring to a section of the *Galland* opinion written in invisible ink; no such statements are found anywhere in *Galland*. On the contrary, the California Supreme Court in *Galland* repeatedly confirmed that a claim for inverse condemnation is unequivocally "***precluded***" in California, for plaintiffs in CHV's position. *Galland*, 16 P.3d at 134, 143.

In speculative dicta, *Galland* hints that damages (as opposed to just compensation) *might*, under certain circumstances, eventually be available to rental property owners —but not as a remedy for the taking alleged by CHV. Specifically, *Galland* speculates that *if* an injured property owner (1) successfully pursues a *due process* remedy of invalidation, *and* (2) returns to the Rent Board to initiate a second, duplicative administrative proceeding based on the same rent application the Board had previously denied, *and* (3) somehow succeeds in obtaining a new final determination granting not only the fair return that was previously denied, but enough in addition to offset the damages inflicted by the Board's prior denial, *and* (4) determines, after the passage of an unspecified time, through some unspecified process of evaluation, that the private third parties from whom the damages are to be recovered are unable or unwilling to pay off the Board's liability, *then* (5) such an owner *might* (or might not) be allowed to seek damages in state court under 42 U.S.C.

§ 1983. *Galland*, 16 P.3d at 148. But of course, that would be a different case.

At the present time, CHV has a fully ripe regulatory takings claim against the City under *Williamson County's* first prong—the Rent Board has reached a final determination and has no further discretion in the matter. CHV has suffered serious economic injury and interference with its investment-backed expectations. Yet it is undeniable that for *this* injury, as CHV presently stands before the Court, the State of California does not provide an inverse condemnation remedy. To the extent the City claims inverse condemnation is presently available to CHV, the City simply misstates the law.

C. Ultimately, the City Concedes That the Only "Remedy" the California Courts *Actually* Offer Plaintiffs in CHV's Position Is a (Hypothetical) Opportunity to Attempt to Collect the City's Liability for Damages from Innocent Third Parties

Ultimately, the City is forced to concede that—notwithstanding dicta concerning the "uncertain" or "speculative" availability of a damages remedy that has in fact never been made available to any party—CHV's only hope of being made whole lies in its ability to collect the City's liability from private third parties. *If* CHV were to obtain a writ invalidating the final determination that forms the basis of its takings claim, and *if* thereafter it somehow convinces the Rent Board to reach a new final determination that would not only provide CHV with a fair return, but provide for increasing rents sufficiently to recover the monetary equivalent of the damages inflicted by the Board's original action, the City believes the Fifth Amendment would be satisfied. Opp. at 14.

The City's offhand comment to the effect that there will always be people living in mobile home parks who can be pressed into service to pay its debts (Opp. at 10-11) is striking

in its callous disregard of the burdens the City is willing to shift onto parties who in all likelihood received no benefit from the taking, and certainly played no role in the official decision that violated CHV's constitutional rights. More significantly, the City is simply wrong in asserting that "just compensation" need not be paid *by the government* in order to satisfy the Takings Clause. The City seeks to distinguish the authorities CHV advanced on this point on the basis of trivialities—whether a case involved a physical versus a regulatory taking, for example, or was brought under the Tucker Act. Opp. at 14. But such quibbling misses the point. As amicus Western Manufactured Housing Communities Association pointed out in its Brief Amicus Curiae in Support of Petition for Certiorari (WMHC Brief), "[a]llowing the constitutional wrongdoer to shift liability to innocent third parties is no way to enforce a constitutional right." WMHC Brief at 14. The City's intransigence on the propriety of shifting its liability for compensation onto others emphasizes the need for this Court to grant certiorari to address this independent issue, which was raised but left unresolved in *Suitum*.

CONCLUSION

For all the reasons stated above, and for the reasons set out in the Petition and in the amicus brief of the Western Manufactured Housing Communities Association, the Petition for Certiorari should be GRANTED.

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Respectfully submitted,

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